INDEX

PAGE

INTRODUCTION 1

A. The Nature of This Case and the Appellees' Interests 2

B. The Appellees' Shift of Position and Effort to obtain Affirmance on Different Grounds 4

I. The Commission's Ruling was in Full Accord With the "Long Established Rule" and Patently Did Not "Depart" from any "Norm" 6

II. Appellees' Attack on the Commission's Use of the Current Maxima as a Yardstick is without Merit.. 9

III. The Commission Properly Considered "The Effect of Rates on the Movement of Traffic" under Section 15a(2) 15

IV. Appellees Wholly Fail to Justify the District Court's Order Suspending the Charges 19

CONCLUSION 25

CITATIONS

PAGE

CASES:

Ad Hoc Committee on Consumer Protection v. *United States*, 313 F. Supp. 119 (D.D.C. 1970) 22

Arrow Transportation Co. v. *Southern Railway Co.*, 372 U.S. 658 (1963) 21, 22, 23, 24

Atlantic Creosoting Co., Inc. v. *Southern Ry Co.*, 323 I.C.C. 533 (1964) 10

Board of Trade of Kansas City v. *United States*, 314 U.S. 534 (1942) 13, 15

Board of Trade of Kansas City, Missouri et al v. *The Atchison, Topeka and Santa Fe Railway Company, et al.*, No. 19321-4, filed April 23, 1971, (W.D. Mo.) 12

Cantlay & Tanzola, Inc. v. *United States*, 115 F. Supp. 72 (S.D. Calif. 1953) 21

Chamber of Commerce of Fargo, N.D. v. *United States*, 276 F. Supp. 301 (D.N.D. 1967) 8

Chicago, B. & Q. Ry. Co. v. *United States* 60 F. Supp. 580 (E.D. Ky. 1945) 9, 16

Chicago & N.W. Ry. Co. v. *A.T. & S.F. Ry. Co.*, 387 U.S. 326 (1967) 6

Chicago and North Western Railway Co. v. *Chicago, B. & Q. R. Co.*, 382 U.S. 422 (1966), affirming *Chicago, B. & Q. R. Co.* v. *United States*, 242 F. Supp. 414 (1965) 11

Ex Parte 259, Increased Freight Rates, 1968, 332 I.C.C. 714 (1969) 19

Fargo v. *Chicago, M., St. P. & P. Ry. Co.*, 329 I.C.C. 650 (1966) 10

Federal Power Commission v. *Idaho Power Co.*, 344 U.S. 17 (1952) 24

Georgia v. *Pennsylvania Railroad Co.*, 324 U.S. 439 (1945) 10

PAGE

Grain and Grain Products, 205 I.C.C. 301 (1934) 14

Grand Forks Chamber of Commerce v. *Great Northern Railway*, 321 I.C.C. 356 (1963). 11

Increased Freight Rates, 1967, 332 I.C.C. 280 (1968) .. 11

Inland Steel Co. v. *United States*, 306 U.S. 153 (1939) 21, 22

Interstate Commerce Commission v. *Inland Waterways Corp.*, 319 U.S. 671 (1943) 13, 14

Interstate Commerce Commission v. *New York, N.H. and H. R. Co.*, 372 U.S. 744 (1963) 18

Mississippi Valley Barge Line v. *United States*, 292 U.S. 282 (1934) 15

National Small Shipments Traffic Conference, Inc. v. *United States*, 321 F. Supp. 500 (S.D. N.Y. 1970) 21, 24

New York Central R. Co. v. *United States*, 99 F. Supp. 394 (D. Mass. 1951) 10

Northwestern Steel & Wire Co. v. *Pennsylvania R. Co.*, 305 I.C.C. 462 (1958) 8

Oscar Mayer & Co. v. *United States*, 268 F. Supp. 977 (W.D. Wis. 1967) 21

Port of New York Authority v. *United States*, 451 F.2d 783 (2d Cir. 1971) 21

Public Service Commission v. *Great Northern Railway Company*, 340 I.C.C. 739 (1972) 11

R. M. Holingshead Corp. v. *A & S. R. Co.*, 319 I.C.C. 86 (1963) 10

Seaboard Air Line Co. v. *Southern Ry.*, 329 I.C.C. 17 (1966) 8

Seaboard Air Line R. Co. v. *United States*, 382 U.S. 154 (1965) 6

Texas & Pac. Ry. Co. v. *United States*, 289 U.S. 627 (1933) 10

PAGE

Transit Charges, Southern Territory, 332 I.C.C. 664 (1968) 18

United States v. *Chicago, M., St. P. & P. Ry. Co.*, 294 U.S. 499 (1935) 10

United States v. *Florida East Coast Railway Co.*, 41 Law Week 4247 (January 22, 1973) 2

United States v. *Great Northern R. Co.*, 343 U.S. 562 (1952) 5, 6

United States v. *Interstate Commerce Commission*, 88 F.2d 780 (D.C. Cir. 1937) 9, 16

United States v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952) 8

United States v. *Morgan*, 307 U.S. 183 (1939) 21, 22

United States v. *Saskatchewan Minerals*, 385 U.S. 94 (1966) 24

Whatcom County Traffic and Rates Bureau v. *Chicago, M., St. P. & P. Ry. Co.*, 287 I.C.C. 442 (1952) 10

Wirthmore Feeds, Inc. v. *Baltimore and Ohio Railroad Co.*, 221 F. Supp. 745 (W.D. N.Y. 1963) 21

STATUTES:

Interstate Commerce Act

Section 13(1), 49 U.S.C. § 13(1) 13, 22

Section 15(1), 49 U.S.C. § 15(1) 13

Section 15(7), 49 U.S.C. § 15(7) 4, 14, 17, 20, 23, 24

Section 15a(2), 49 U.S.C. § 15a(2) 5, 7, 8, 15, 16, 17, 19

Section 15a(3), 49 U.S.C. § 15a(3) 18

Other Statutes

Rule 65(d), Federal Rules of Civil Procedure ... 20

Packers & Stockyards Act, 7 U.S.C. § 181 *et seq.*... 22

Administrative Procedure Act, Section 6, 5 U.S.C. § 706 ..... 23, 24

Urgent Deficiencies Act of 1913, 38 Stat. 219 *et seq.* 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-214

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

Appellants,

vs.

THE WICHITA BOARD OF TRADE, et al.,

Appellees.

No. 72-433

INTERSTATE COMMERCE COMMISSION,

Appellant,

vs.

THE WICHITA BOARD OF TRADE, et al.,

Appellees.

Appeals From The United States District Court For The District of Kansas

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REPLY BRIEF FOR THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.

INTRODUCTION

At the outset, before dealing with the principal arguments advanced by the appellees, it is appropriate to note: (A) the nature of the case and the appellees' interests; and (B) the appellees' tacit acknowledgment that the District Court's rationale cannot support its judgment and the appellees' effort to have this Court affirm on other grounds.

A. The Nature of This Case and the Appellees' Interests

Unlike the usual rate case, this case involves charges which the railroads hoped they would never have to collect (A. 19, 70). The purpose behind the charges is, not to obtain additional revenue from the charges, but instead to discourage in-transit inspections, encourage other sampling methods (particularly the use of origin samplers), and thereby increase car utilization. Just this past month, this Court again recognized the crucial nature of the Nation's car supply problem:

> "This case arises from the factual background of a chronic freight car shortage on the Nation's railroads which we described in *United States* v. *Allegheny-Ludlum Steel Corp., supra.* Judge Simpson, writing for the District Court in this case, noted that "[f]or a number of years portions of the nation have been plagued with seasonal shortages of freight cars in which to ship goods." 322 F. Supp. 725, 726 (MD Fla. 1971). Judge Friendly, writing for a three-judge District Court in the Eastern District of New York in the related case of *Long Island R. Co.* v. *United States,* 318 F. Supp. 490, 491 (EDNY 1970), described the Commission's order as "the latest chapter in a long history of freight car shortages in certain regions and seasons and of attempts to ease them."

United States v. *Florida East Coast Railway Co.*, 41 Law Week 4247, 4249 (January 22, 1973).

That the charges are having the contemplated effect is demonstrated by subsequent reports to the Commission. These reports (filed with the Clerk of the Court) show that the proportion of grain shipments inspected in-transit before the charges became effective was ***nearly 2½ times higher*** than the proportion inspected in-transit after the charges became effective. Stated otherwise, the propor-

tion was reduced *almost 60%*. The proportion continues to dwindle. Thus, in April 1972, *only 21.5%* of grain shipments were inspected in transit.[1] (See our main brief, pp. 13, 28) Further reductions—with corresponding improvement in car utilization—may be expected as the charges continue in force.

It is precisely this reduction in in-transit inspections which the grain exchange appellees so vigorously oppose. Their concern is not so much that shippers will *pay* the charge for in-transit inspection but rather that the shippers will *avoid* the charge by the use of origin samplers (or destination sampling or the avoidance of sampling altogether), with the result that the grain exchanges and their commission merchant members will lose the "captive market" benefits (including both sale commissions and inspection fees) they enjoy on grain shipped to their locations for in-transit inspection. As the Commission found (A. 55, 18), "[b]ecause of the economic impact of the charges, the approval given herein should accelerate the use of origin samplers," and ". . . this method of inspection does not

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[1]The grain exchange appellees spuriously claim there was only "a drop of 31%" (Wichita Br. 15, footnote) and "approximately one-third" (id. at 14). They reach this conclusion by comparing April-September 1972 with April-September 1971. But the charges (which became effective on May 4, 1971) *were in effect during almost all of the April-September 1971 period.* Thus, appellees are comparing two periods when the charges were in effect. The appellees' comparison serves only to demonstrate the *continuing decline* of in-transit inspections *after* the charges became effective, and wholly fails to reflect the dramatic impact of making the charges effective. (Furthermore, even as between the two periods compared by appellees, the decline would have been even greater if it were not for the fact that the charges were inoperative from June 8, 1972 to July 7, 1972 by reason of the District Court's suspension order.)

adversely affect the grain marketing process."[2] Through the use of such samplers, any shipping point can become an inspection point, thereby giving the shipper the benefits of true nationwide competition for his grain instead of being limited to the prices available at just one market or only a few markets.

On the other hand, unlike the grain exchange appellees, appellee Secretary of Agriculture (USDA Br. 4; A. 30) does not oppose the imposition of a separate charge but instead seeks adjustment of the line-haul rates to reflect the elimination of in-transit inspections. Of course, to the extent that in-transit inspections are eliminated, neither producers nor shippers are subject to the railroad charge for such inspections.

B. The Appellees' Shift of Position and Effort to Obtain Affirmance on Different Grounds.

Although sustaining the Commission's principal findings (A. 101-102), which it then chose to disregard, the District Court based its decision on one ground and only one ground —the Commission's alleged departure from its prior decisions by adopting "an evidentiary rule which is discriminatory per se. . . ." (A. 105).[3] This rationale was based

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[2] The Commission also found that "it is not essential to the marketing process that this sampling and grading take place while the grain is in transit on the railroad" (A. 35). The extravagant statements to the contrary by the grain exchange appellees (e.g., Wichita Br. 6-7, 14) are utterly without support in the Commission's findings, and are also precluded by appellees' admitted (id. at 9) failure to seek judicial review of the evidence supporting these findings.

[3] Throughout their brief, the grain exchange appellees blandly assert again and again that the District Court based its decision on the ground that the carriers had failed to meet the statutory burden of proof imposed by § 15(7). An examination of the opinion be-

entirely on a Commission *dictum* stated in the course of setting forth an expressly *secondary* reason for distinguishing an earlier Commission decision. See our main brief, pp. 31-32.

In this Court, although they continue to attack the *dictum* (USDA Br. 13-14; Wichita Br. 20, 25-26), the appellees seek to have this Court review the record *de novo* and affirm on wholly different grounds.

The appellees now acknowledge—as they must—that the Commission did indeed consider and approve the reasonableness of the *combination* of the proposed charges and the line-haul rates (e.g., Wichita Br. 17). But the appellees complain about the *evidence* which the Commission relied upon to make that finding. The grain exchange appellees (Wichita Br. 20-27) now claim—for the first time in this proceeding—that § 15a(2) requires evidence of actual cost as a *sine qua non* of any Commission determination of the reasonableness of rates. And it is argued in both briefs of appellees (Wichita Br. 27-37; USDA Br. 15-20) that the Commission erred in accepting, on the facts of this case, the currently authorized maximum rates as the upper level of the "zone of reasonableness." The grain exchange appellees (Wichita Br. 38-44) also take issue with the Commission findings concerning possible diversion of grain shipments to trucks and barges.

Examination of the District Court's opinion (A. 100-106) readily demonstrates that the Court did not pass on any of these additional contentions now pressed by the appellees. Although it is not the Court's general practice "to review an administrative record in the first instance," *United*

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low demonstrates the complete lack of substance in this attempted reconstruction of the District Court's holding. The appellees' tactic, however, further demonstrates their unwillingness to defend the actual rationale of the District Court.

States v. *Great Northern R. Co.*, 343 U.S. 562, 578 (1952); *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154, 157 (1965), the Court has on occasion reviewed issues *de novo*. E.g., *Chicago & N. W. Ry. Co.* v. *A. T. & S. F. Ry. Co.*, 387 U.S. 326, 356 (1967). In any event, appellees' shift of position constitutes tacit recognition that the District Court's rationale cannot support its judgment, and appellees' additional contentions (discussed *infra*, pp. 9-19) are clearly without merit.

I. THE COMMISSION'S RULING WAS IN FULL ACCORD WITH THE "LONG ESTABLISHED RULE" AND PATENTLY DID NOT "DEPART" FROM ANY "NORM."

Apparently on the theory that sufficient repetition of an untruth will make it true, the appellees persist in imputing to the Commission some "long established rule" from which it allegedly deviated here.

Thus, USDA baldly states again and again, in varying verbal combinations, that,

> "[w]here the railroads seek to establish a separate charge for a service theretofore encompassed in the line-haul, the Commission has for over fifty years required them to first demonstrate that the line-haul rate is insufficient to compensate them for the total transportation, including the service to be segregated."

(USDA Br. 11-12; see also USDA Br. 5, 9, 16, 23, and Wichita Br. 10, 22-23.) But significantly, *before* citing any authority for the quoted proposition, which is completely unsupportable, USDA (p. 12) retreats and interjects the following—and substantially different—restatement of the "long established rule":

> "Stated conversely, it is the carriers' burden under section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), to demonstrate that not only the sepa-

> rate charge but also the total transportation charges resulting from its addition to the line-haul rates are just and reasonable."

(See also USDA Br. 6-7.) The decisions then cited by USDA (and cited by Wichita Br. 22-23) do indeed support this restatement of the "long established rule." However, *the Commission's decision in this case is in full accord with this restatement of the "rule" and with the cited cases,* as shown in our main brief (pp. 38-41).

There is, in short, no "long established rule" inflexibly requiring detailed cost evidence regardless of the circumstances, particularly where as here the service is optional in character and not an essential part of the line-haul transportation (A. 17-18). The "rule" instead is that the Commission must consider the reasonableness of the combination of the proposed charges and the line-haul rates, and *clearly that is what the Commission did here.* Accordingly, the basic premise of the decision below and appellees' briefs is simply unfounded.

The grain exchange appellees (Wichita Br. 20-27) go even further than USDA and argue that § 15a(2),[4] merely because it refers to "the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service" among the factors to be given "due consideration," makes a cost analysis indispensable in every rate proceeding re-

[4] Section 15a(2), 49 U.S.C. § 15a(2), provides: "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

gardless of the circumstances. To begin with, this newly conceived statutory argument is barred since no such contention was made in the Commission proceeding. See, e.g., *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952): ". . . orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. . . ."

In any event, the contention is baseless. It is well-established that the Commission may evaluate the reasonableness of a proposed rate by comparing it with other existing rates.[5] See, e.g., *Chamber of Commerce of Fargo, N.D.* v. *United States*, 276 F. Supp. 301, 307 (D.N.D. 1967); *Northwestern Steel & Wire Co.* v. *Pennsylvania R. Co.*, 305 I.C.C. 462, 464 (1958). As the Commission pointed out in *Seaboard Air Line Co.* v. *Southern Ry.*, 329 I.C.C. 17, 27-28 (1966):

> "[C]ost data are not the only bases for a determination of the reasonableness of the assailed rates. While it is true that in absence of other probative evidence cost data may be the crucial factor, our conclusion here as to the reasonableness of the assailed rates is based on broader criteria . . . . The words "just and reasonable" are not fixed, unalterable, mathematical terms. The determination of what is a reasonable rate, measured solely by cost data, would seriously limit the exercise of a flexible judgment."

Furthermore, the "due consideration" required by § 15a(2) neither compels the introduction of evidence on each factor mentioned nor dictates the manner in which the Commis-

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[5] Even the grain exchange appellees (Wichita Br. 28) acknowledge that ". . . rate comparisons have sometimes been used in the past by the Commission to test the validity of particular rates. . . ."

sion shall implement the statute. *United States* v. *Interstate Commerce Commission,* 88 F.2d 780, 783 (D.C.Cir. 1937); *Chicago B. & Q. Ry. Co.* v. *United States,* 60 F. Supp. 580, 585 (E.D. Ky. 1945).

II. APPELLEES' ATTACK ON THE COMMISSION'S USE OF THE CURRENT MAXIMA AS A YARDSTICK IS WITHOUT MERIT.

As we have shown, and as the Commission opinions make clear, the Commission did indeed consider and uphold the reasonableness of the aggregate charges. In doing so, the Commission found (A. 38, 56) that "in Docket No. 17000, Part 7, proceedings, a maximum reasonable level of rates on grain in the West was established"; that "[t]here is possibly no segment of this country's railroad freight rate structure that has been reviewed more frequently than the one that has application to the movement of grain and grain products"; that "in practically every general freight rate increase proposal made by the railroads in the past 10 years particular attention has been given to the level of the grain rates and, in several instances, the increases in rates on grain and grain products were less than those authorized for the movement of other commodities"; that "[t]he Docket No. 17000, Part 7, prescribed rates, as increased through the subsequently authorized general increases, are a currently effective maximum rate level for the movement of these commodities"; and that the proposed inspection charges when added to the line-haul rates do not exceed this maximum level.

Although the District Court did not pass on the issue, the appellees attack the Commission's use of the current maxima as a yardstick of reasonableness and ask this Court to review the matter *de novo* and affirm on that ground.

Appellees argue at length that these maxima exceed the rates which move most grain traffic and which are depressed

because of competitive pressures (A. 20). But it certainly does not follow that such competitive pressures (although they may produce bargain rates for shippers) invalidate applicable maxima. Likewise, the availability of an alternative lower rate does not, as appellees seem to suggest (USDA Br. 21-22; Wichita Br. 27-29), convert *that* rate into the applicable maximum. "The Commission has consistently held that depressed rates are not a proper standard for determining the reasonableness of other rates," *Fargo* v. *Chicago, M., St. P. & P. Ry. Co.*, 329 I.C.C. 650, 654 (1966), and "that rates depressed to meet competition do not afford an acceptable standard with which to measure the maximum reasonableness of rates." *Atlantic Creosoting Co., Inc.* v. *Southern Ry. Co.*, 323 I.C.C. 533, 538 (1964). See also, e.g., *R. M. Holingshead Corp.* v. *A & S. R. Co.*, 319 I.C.C. 86, 89 (1963); *Whatcom County Traffic and Rates Bureau* v. *Chicago, M., St. P. & P. Ry. Co.*, 287 I.C.C. 442, 443 (1952).

As this Court has pointed out: "A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." *United States* v. *Chicago, M., St. P. & P. Ry. Co.*, 294 U.S. 499, 506 (1935). "Within that zone the Commission lacks power to grant relief." *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 461 (1945). See also *Texas & Pac. Ry. Co.* v. *United States*, 289 U.S. 627, 635-637 (1933); *New York Central R. Co.* v. *United States*, 99 F. Supp. 394, 398-399 (D.Mass. 1951); *Fargo* v. *Chicago, M., St. P. & P. Ry. Co.*, 329 I.C.C. 650, 654 (1966).

Under all the circumstances, particularly its intimate familiarity with the grain rate structure, the Commission was well justified in exercising its discretion to use the adjusted Docket 17000 rates as a yardstick of the upper level of the applicable "zone of reasonableness."

This case is but the latest chapter in a long history of Commission experience in this area. The Commission has over the years conducted an on-going review of the grain rate structure, has repeatedly considered the reasonableness of grain rates in general increase cases, and has *previously applied the same yardstick of reasonableness.*

For example, in *Increased Freight Rates, 1967,* 332 I.C.C. 280, 300 (1968), the Commission stated that "[w]e have not, however, been referred to any rates which exceed the level prescribed in *Grain and Grain Products,* 205 I.C.C. 301, and subsequent reports, as increased in prior general revenue proceedings" and ". . . the modest increase cannot be found to result in rates which exceed a maximum reasonable level . . . ."

Similarly, in a case relied upon by the District Court (A. 103), *Grand Forks Chamber of Commerce* v. *Great Northern Railway,* 321 I.C.C. 356, 359 (1963), the Commission approved a separate charge for in-transit inspections and specifically noted that "[t]he total charges under the group 3 rates, including the assailed charge [for in-transit inspection], are generally less than those under the group 1 rates . . . ."—i.e., the adjusted Docket 17000 rates. And just this past year, in *Public Service Commission* v. *Great Northern Railway Company,* 340 I.C.C. 739 (1972), the Commission sustained the reasonableness of rates on barley which were at the level of Docket 17000 rates adjusted by subsequent general increases. The Commission (p. 750) held that the rates did not exceed a maximum reasonable level and that it was unnecessary to consider the cost evidence of record.

See also, e.g., *Chicago and North Western Railway Co.* v. *Chicago, B. & Q. R. Co.,* 382 U.S. 422 (1966), affirming *Chicago, B. & Q. R. Co.* v. *United States,* 242 F. Supp. 414 (1965), holding that the Docket 17000 prescriptions could not be vacated without reopening of a rule-making proceeding.

As those cases illustrate, far from being meaningless "paper rates," the adjusted Docket 17000 rates have been of continuing importance and vitality. In any event, it is for the Commission—not the Courts—to determine whether particular rates constitute a currently effective maximum rate level, and the Commission specifically made that finding here (A. 38).

The grain exchange appellees are in a particularly poor position to object to the Commission's reliance on the adjusted Docket 17000 rates. In an earlier related case, filed after the Division 2 decision but before the tariffs became effective, essentially the same group of appellees sought to enjoin the carriers from putting the tariffs into effect on the ground (*inter alia*) that "[the] subject tariffs would also result in *charges which exceed those which these railroads are required to observe as a maximum under the Commission's outstanding orders in its Docket 17000, Part VII.*"[6] (Italics added.)

Despite their own reliance on the adjusted Docket 17000 rates, the appellees contend that the Commission's reference to those rates was improper because the Commission's orders in general increase proceedings (unlike the original Docket 17000 orders) do not "prescribe" rates. But while the validity of individual rates may not be adjudicated in a general increase proceeding, the Commission does determine the reasonableness of the overall level of rates approved by it and, as noted, has given particularized attention to grain rate levels. Appellees' argument necessarily assumes that the Commission, in selecting a yard-

[6] Complaint in *Board of Trade of Kansas City, Missouri, et al* v. *The Atchison, Topeka and Santa Fe Railway Company, et al.*, No. 19321-4 (W.D. Mo.), filed on April 23, 1971. The District Court denied the requested preliminary injunction, and the action was then dismissed by agreement of the parties.

stick to measure reasonableness, is barred from reliance on currently applicable maxima unless those maxima have been "prescribed." We are unaware of any basis for such an artificial restriction on the Commission's exercise of its discretion.

Moreover, contrary to the implication of the appellees' argument, the Commission's order in this case did not "prescribe" or definitively adjudicate the line-haul rates. Instead, they ". . . stand only as carrier-made rates which, under the Commission's decisions, leaves them open to possible recovery of reparations." *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 687 (1943). Such rates may also be challenged through a complaint proceeding under § 13(1) of the Act, 49 U.S.C. § 13(1), or by a request that a lower maximum level be established under § 15(1), 49 U.S.C. § 15(1).[7]

In view of these alternative remedies which will still be open to the appellees, and in light of the Commission's history of particularized attention to grain rate levels, it was well within the Commission's broad discretion in responding "to the dynamic character of transportation problems" (*Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942)) to use the "currently effective maximum rate level for the movement of these commodities" as a yardstick to measure the reasonableness of the aggregate charges. Particularly is this so in view of the special func-

[7] USDA (Br. 20) also objects to the use of current maxima as a yardstick on the ground that as originally prescribed the Docket 17000 rates encompassed in-transit inspection privileges without additional charge and that therefore the adjusted Docket 17000 rates do not constitute an appropriate yardstick for a shipper who elects to forego in-transit inspection. USDA, however, overlooks the facts (1) that the line-haul rate charged to such a shipper will still be in the currently applicable "zone of reasonableness" since that rate cannot exceed the adjusted Docket 17000 rates; (2) that such a

tion and need for dispatch in § 15(7) proceedings. See *Inland Waterways, supra,* 319 U.S. at 689-690.

In the circumstances, it is nothing but sophistic sloganeering for appellees to assert (as they do repeatedly) that a separate inspection charge results in "a double charge for a single service" and that "those shippers who no longer take advantage of in-transit inspection . . . are still paying for a service which they no longer receive . . . ." (USDA Br. 11, 20; see also USDA Br. 10, 21, 22, and Wichita Br. 5). Such assertions are necessarily based on an assumption that all existing rates are "frozen" by law and that a carrier is somehow barred from making any rate adjustment *even though the adjusted rate does not exceed the upper level of the zone of reasonableness.* This, of course, is plainly not the law, as shown *supra,* pp. 9-10.

The basic issue before the Commission was whether the aggregate charges exceed reasonable maxima and whether the separate charge for the inspection service is itself reasonable. The Commission resolved both rate issues in favor of the validity of the rates "on the usual basis of review" (A. 54), and additionally considered the impact of such rates on the national car supply shortage (A. 54-55). Particularly in the rate-making area, "[t]he judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

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shipper still retains his remedies under the Act to redress any possible inequity in his individual situation; and, perhaps most important, (3) that the original Docket 17000 orders *permitted* but did not *require* the railroads to grant in-transit inspection privileges without a separate charge. The Commission stated: "Under present tariffs, inspection is left to the discretion of the carriers. . . ." *Grain and Grain Products within the Western District and for Export,* 205 I.C.C. 301, 349 (1934). Thus, contrary to appellees' contention, tariffs *not* providing for in-transit inspection would have been equally subject to the prescribed maxima.

Mississippi Valley Barge Line v. *United States*, 292 U.S. 282, 286-287 (1934). See also *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942). In the instant case, the Commission's findings (sustained by the District Court, A. 101-102, but otherwise largely ignored by it) set forth not only a "rational basis" for the Commission's conclusions, in full accord with established principles, but also a compelling national need for the action taken by the Commission.

III. THE COMMISSION PROPERLY CONSIDERED "THE EFFECT OF RATES ON THE MOVEMENT OF TRAFFIC" UNDER SECTION 15a(2).

The grain exchange appellees also ask this Court to review *de novo* their argument that the Commission violated § 15a(2) of the Interstate Commerce Act[8] by allegedly "shifting to the shippers the burden of proving whether the increased total charges would result in diverting rail traffic to competing barge and truck lines" (Wichita Br. 38). The appellees further contend that the Commission's findings on the diversion issue are unsupported by substantial evidence and, remarkably, ask this Court to examine the administrative record *de novo* for that purpose (Wichita Br. 40-44). Both these contentions (neither of which was passed on by the District Court or even mentioned in the opinion below) are patently without merit.

Section 15a(2) requires only that the Commission give "due consideration, among other factors . . ." to a series of specified factors, including "the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed." The weight to be given to this factor, and other § 15a(2) factors such as the public need for "adequate and efficient railway transportation service,"

[8] The statute is set forth at footnote 4, p. 7, *supra*.

is left to the discretion and judgment of the Commission. *United States* v. *Interstate Commerce Commission*, 88 F.2d 780, 783 (D.C.Cir. 1937); see also *Chicago B. & Q. R. Co.* v. *United States*, 60 F. Supp. 580, 585 (E.D. Ky. 1945).

In this case, the Commission did give careful consideration to the factors listed in § 15a(2), all of which are closely interrelated in this proceeding. The primary "effect of rates on the movement of traffic" is analyzed by the Commission in terms of the railroad car supply problem (A. 54-56). The Commission concluded that the inspection charges would result in a significant improvement in car utilization (A. 55, 56). The Commission also pointed out that "[a]nother matter not to be ignored is the loss of revenue caused by the reduced car supply due to grain inspections" (A. 55)—a loss estimated "at more than $10 million annually" (A. 55) as shown in an appendix to the Commission's report (A. 57).

It is difficult to imagine any more salutary "effect of rates upon the movement of traffic" than a significant increase in availability of freight cars for handling of grain traffic, particularly in periods of peak demand as at the present time. In addition, the railroads derive revenue benefits from increased utilization of their equipment.

However, the appellees (Wichita Br. 39) view the § 15a(2) issue more narrowly as solely one concerning possible diversion of traffic to trucks and barges. With respect to such diversion, which of course is but one aspect of "the effect of rates upon the movement of traffic," the Commission in this case stated (A. 39):

> "One of the grounds relied upon by the division in *Transit Charges, Southern Territory, supra,* was that the proposed increase in charges might well result in substantial diversion of the considered traffic with a diminution, rather than an increase, in revenues. Simi-

> lar conclusions are not warranted here. Comparative costs to the shipper of the movement of grain by railroad versus the movement by truck or barge is essential before a decision can be reached on diversion, and there is no showing here which relates the cost of truck or barge transportation to the cost of rail transportation with the inspection charge added. Grain will continue to be moved by railroad even if it becomes necessary to pay the proposed charge because of the advantages, such as transit and reconsignment, that are available."

Although the appellees' statutory argument is by no means clear, apparently they contend that the Commission's reference in this excerpt to the lack of a "showing here which relates the cost of truck or barge transportation to the cost of rail transportation with the inspection charge added" demonstrates a shifting of the carriers' § 15(7) burden to the shippers (Wichita Br. 39, 40). It unquestionably does nothing of the kind.

Section 15(7) provides that "the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable." But, contrary to the premise of appellees' argument, it has never been held that this provision requires the carrier to prove whatever *defenses* are asserted by complaining parties, to cure the deficiencies in proof offered by complaining parties, or to adduce exhaustive evidence on every conceivable question that might bear on the ultimate issue of reasonableness. Such proceedings, as this case shows, are adversary in character; and the mere fact that protesting shippers fail to sustain their objections, as here, cannot be converted *ipso facto* into a shifting of the burden of proof. Indeed, if there were any substance to appellees' extraordinary argument, it would mean that carriers would be responsible for shippers' evidentiary deficiencies on *any* of the myriad factors referred to in § 15a(2).

In the decision distinguished by the Commission (A. 39) and relied upon by the appellees (Wichita Br. 39, 40), *Transit Charges, Southern Territory* 332 I.C.C. 664, 684 (1968), the Commission laid down the rule as to the type of evidence required to establish that diversion will occur:

> "The proposal, if approved, may well cause a substantial diversion of traffic to competing modes, especially exempt motor carriage. The record indicates that this loss of traffic, at least insofar as certain cotton shippers are concerned, is more than a mere empty threat, *but is rather backed by careful analyses of shippers' costs.*" (Italics added.)

This evidence—"careful analyses of shippers' costs"—was presented by the *shippers* in *Transit Charges* (p. 671) and found persuasive by the Commission in that case. But in this case, as the Commission found, the shippers made "no showing" of that nature (A. 39). While the carriers bear the ultimate burden of proving the reasonableness of the rates, the burden of going forward with "careful analyses of shippers' costs" on the diversion issue—after the carriers have first established that the inspection charges will have a beneficial effect on their traffic—obviously rested with the protesting shippers since analyses of their own modal-comparative costs are peculiarly within their own capacity and knowledge and since they will be the ones who make the decision whether to divert traffic. Cf. *Interstate Commerce Commission* v. *New York, N. H. and H. R. Co.*, 372 U.S. 744, 760 (1963).[9] Appellees' failure to present such proof can hardly be blamed on the carriers.

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[9] In that case, relating to a parallel provision in § 15a(3), this Court rejected a similar burden-of-proof argument and held: "... we agree with the court below that if a carrier shows a proposed rate to be just and reasonable from the standpoint of its own revenue requirements, it is for a protesting carrier who relies on a claim of inherent cost advantage to bear the burden of persuading the Commission of the existence of that advantage." (372 U.S. at 760 n. 12.)

In sum, the charges were shown to have a beneficial effect upon the movement of traffic, and the Commission gave due consideration to the standards enumerated in § 15a(2).[10]

IV. APPELLEES WHOLLY FAIL TO JUSTIFY THE DISTRICT COURT'S ORDER SUSPENDING THE CHARGES.

After directing a remand of the case to the Commission, the District Court *sua sponte* ordered that the inspection charges (which had been in effect for over a year and had previously been suspended by the Commission for the maximum seven-month period) "are suspended and shall be ineffective until and unless otherwise ordered by this Court" (A. 106).

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[10] The appellees' claim (Wichita Br. 44) that the Commission's diversion finding is unsupported by substantial evidence can only be regarded as frivolous. The appellees (Wichita Br. 43-44) cite the testimony of a single witness with respect to the comparative costs of a single shipper from Indiana to Chicago. This testimony was not only substantially undercut on cross-examination, but also could hardly be found to be representative of the entire Western District. The appellees (Wichita Br. 41) also assert that a large number of shippers testified that the charges would result in diversion of traffic to trucks. The testimony listed contains general allegations of diversion and no detailed comparison of rail and truck or water costs. General allegations of diversion are so often made in rate proceedings that, as the Commission observed in *Ex Parte 259, Increased Freight Rates, 1968*, 332 I.C.C. 714, 716 (1969): "Predictions of this nature are always diametrically opposed in rate increase cases and must be treated as having limited probative value."

On the other hand, the railroads showed that elimination of in-transit inspections would in no sense place the railroads at a service disadvantage compared with other modes. Highway and water carriers have been able to avoid the kind of delays to their equipment the railroads have experienced as a result of tying up equipment enroute for purposes of inspection. In addition, as the Commission found (A. 39), rail carriers offer other service advantages,

The District Court took this action

(1) without any request by the appellees to grant such relief[11],

(2) without any discussion of its authority to do so,

(3) without any finding of irreparable injury, and

(4) without any other findings to support issuance of an injunction (Rule 65(d), F.R.Civ.P.).

Nevertheless, the appellees attempt retroactively to rationalize the District Court's suspension order on the ground that a District Court has equitable jurisdiction to enjoin rates in order to prevent irreparable injury,[12] at least when the Court has concluded on review of a Commission decision that the carriers have failed to meet their statutory burden of proof under § 15(7) (Wichita Br. 44-59; USDA Br. 24-40.) Preliminarily, it should be noted that in any event the appellees' argument has no relevance to this case, since (1) the District Court did *not* find that the charges threatened any irreparable injury and (2) the District Court did *not* remand to the Commission because of any failure to meet a statutory requirement. Instead, as its opinion

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which are not offered by other modes, such as transit and reconsignment, and which are not affected by the inspection charges. And there is clearly no diversion threat where shippers avoid inspections entirely or take the inspections at origin or destination.

[11] Although in this Court the appellees contend that district courts had the authority to enjoin the charges on or after September 29, 1971, the date of the Commission's administratively final decision (Wichita Br. 45), and notwithstanding their claims of irreparable injury, they did not seek to obtain such relief at any time after that date. The complaint in this case (filed November 8, 1971) did not request such relief (A. 79-80); nor did USDA (A. 84).

[12] The grain exchange appellees rely upon an affidavit, appended to their brief, which was not even filed with the District Court until after the entry of its judgment.

makes clear beyond question, the District Court held only (and, we believe, erroneously) that the Commission had "departed" from its prior decisions and had failed to adequately explain the alleged "departure."

Furthermore, for the reasons stated in our main brief, pp. 20-27, the appellees' argument and the District Court's suspension order are in irreconcilable conflict with this Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963), and the decision in *National Small Shipments Traffic Conference, Inc.* v. *United States*, 321 F.Supp. 500, 515 (S.D.N.Y. 1970). See also Memorandum for the United States filed in this case and Brief for the Interstate Commerce Commission, pp. 42-50. As recognized in *Arrow* and *National Small Shipments*, Congress intended "to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief" (*Arrow*, 372 U.S. at 667) upon a showing of irreparable injury or otherwise.[13]

Appellees rely on four cases which they characterize as a "well-founded body of precedent" (Wichita Br. 52-54; see also USDA Br. 33, 37) but which on analysis are totally inapplicable. In fact, three of the four were decided long before *Arrow*, and in any event did not even pass on the issue. *Cantlay & Tanzola, Inc.* v. *United States*, 115 F.Supp. 72 (S.D.Calif. 1953); *Inland Steel Co.* v. *United States*, 306 U.S. 153 (1939); *United States* v. *Morgan*, 307 U.S. 183 (1939).

In *Cantlay*, contrary to appellees' misleading statement (Wichita Br. 54), the court (115 F.Supp. at 84) expressly

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[13] Accord: *Oscar Mayer & Co.* v. *United States*, 268 F. Supp. 977, 980 (W.D.Wis. 1967); *Wirthmore Feeds, Inc.* v. *Baltimore and Ohio Railroad Co.*, 221 F. Supp. 745, 746 (W.D.N.Y. 1963); *Port of New York Authority* v. *United States*, 451 F.2d 783, 788 (2d Cir. 1971).

declined to pass on the issue decided ten years later in *Arrow*.

In *Inland Steel*, a § 13(1) case, the injunction referred to in the Court's 1939 opinion (contrary to the implication in USDA's brief, p. 33) did not suspend carrier-made rates but instead set aside a Commission order invalidating a railroad tariff providing for the payment of certain allowances to shippers. The effect of the Court's decree, by setting aside the Commission order, was to let the tariff continue in effect (306 U.S. at 155).

The 1939 decision in *Morgan*, which arose out of a proceeding under the Packers & Stockyards Act, 7 U.S.C. § 181 *et seq.*, is equally irrelevant. Like *Inland Steel*, the *Morgan* case concerned the disposition of a special fund established by a District Court as a condition for the entry of an injunction which set aside an order prescribing reduced rates and thereby left in effect pre-existing rates. In neither case did this Court rule on the propriety of the exercise of injunctive power and, significantly, neither case involved the grant of an injunction in disregard of "a clear congressional purpose to oust judicial power" (*Arrow*, 372 U.S. at 671 n. 22).

The fourth case relied on by appellees is an unreported order referred to in *Ad Hoc Committee on Consumer Protection* v. *United States*, 313 F.Supp. 119, 124 (D.D.C. 1970). The order, remanding the case to the District Court from the Court of Appeals, was entered in emergency session by a two-judge panel, and merely concerned the possible issuance (later granted by the District Court) of a temporary restraining order of twelve days' duration pending immediate review of a Commission order by the District Court. Irrespective of the propriety of such a temporary restraining order for even that limited purpose, it scarcely affords any precedent for the decision below suspending the rates *at the conclusion of the review proceeding* (while simultane-

ously remanding the "matter" to the Commission "for further proceedings"). See our main brief, pp. 25-27.

In short, appellees' so-called "well-founded body of precedent" would not support the District Court's suspension order even if the Court had made findings to support an injunction and had set aside the Commission's order on a different ground. Perhaps recognizing this deficiency, appellees offer a number of additional arguments in an effort to justify the Court's suspension order, but none has any basis in fact or law. Thus, despite the *Arrow* holding, USDA (Br. 25-29, 33; see also Wichita Br. 50-52) argues that the statutory scheme provides for equitable relief, and the grain exchange appellees (Wichita Br. 47, 59) urge this Court to uphold the District Court's suspension order under § 6 of the Administrative Procedure Act (5 U.S.C. § 706).

USDA's analysis of the statutory scheme and its legislative history (which was thoroughly canvassed in the *Arrow* opinion) succeeds only in demonstrating that the Urgent Deficiencies Act of 1913, 38 Stat. 219 *et seq.*, confers jurisdiction to enjoin or set aside Commission orders. But the mere fact that a court is authorized to enjoin *enforcement of an order* does not itself establish any authority in the court to enjoin *the collection of carrier-made rates.* Similarly, the mere fact that a court may exercise equitable power does not bar Congressional limitations on that power. USDA's analysis simply fails to take into account this Court's *Arrow* holding that § 15(7) did indeed withdraw such equitable power from the courts; and clearly there is nothing in the Urgent Deficiencies Act of 1913 to the contrary.

The grain exchange appellees fail to cite any authority in support of their contention that the Commission has "unlawfully withheld" or "unreasonably delayed" agency action within the meaning of § 6 of the Administrative Pro-

cedure Act. Nor have they suggested any reasons why that provision would supersede the command of § 15(7) of the Interstate Commerce Act as interpreted in *Arrow* and *National Small Shipments.*[14]

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[14] The grain exchange appellees (Wichita Br. 59) conclude by requesting this Court to hold that the District Court has the power under § 6 of the Administrative Procedure Act to direct the Commission "immediately to enter an order directing the cancellation of the charges for failing to meet the burden of proof on this record . . . ." Such a request is egregiously improper for a wide variety of reasons. First, there was no failure "to meet the burden of proof on this record," and the District Court did not set aside the Commission order on that basis. (See p. 4, *supra.*) Second, the appellees have failed to establish any right to relief under § 6 of the Administrative Procedure Act. Third, this Court has ruled that a reviewing court has no authority to issue such instructions to an agency on remand. *United States* v. *Saskatchewan Minerals,* 385 U.S. 94, 95 (1966); *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17, 20 (1952).

CONCLUSION

For the foregoing reasons and the reasons stated in our main brief, it is respectfully submitted that the judgment of the District Court should be reversed and the case remanded to that Court with directions to enter a judgment affirming the Commission's order.

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